IRHAM NIAGA SDN BHD & ANOR A

v.

TENAGA NASIONAL BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HAMID SULTAN ABU BACKER J
[SUMMONS NO: D-22NCC-183-2009]
29 JANUARY 2010

CIVIL PROCEDURE: *Pleadings - Striking out action - Grounds for - Whether plaintiffs' action obviously unsustainable - Whether there was prima facie case of deception or fraud for defendant to answer - Whether defendant could stand behind veil of incorporation - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)* C

This was an application by the defendant to strike out the plaintiffs' action under O. 18 r. 19(1)(b), (c) and/or (d) Rules of the High Court 1980 ('RHC') and/or the inherent jurisdiction of the court. The plaintiff had earlier entered into five agreements ('the agreements') with a company ('TNBT') that is wholly owned by the defendant. The plaintiffs' action against the defendant was for a debt accrued by TNBT - based upon an arbitration award ('the award') that was handed down in its favour respecting the agreements. The award has since been registered in the High Court. The action was commenced when the plaintiff discovered that TNBT had been made dormant by the defendant. The relief/declarations sought by the plaintiffs were, *inter alia*, that: (i) the plaintiffs have a legitimate cause of action against the defendant; (ii) the defendant was liable for the sums due and payable by its subsidiary TNBT under the registered award; (iii) the defendant was the alter ego, directing mind and party in effective control of TNBT; (iv) the veil of incorporation be lifted; (v) the defendant's use of TNBT as its contracting vehicle for the agreements was fraudulent; and (vi) the defendant was estopped from denying its liability for the amounts due under the award. D E F G

Held (dismissing the defendant's application to strike out): H

(1) As a state institution providing essential services to the public, the defendant must demonstrate good corporate governance, accountability and transparency at all times. The courts will not ordinarily allow such an institution to avoid liability through circuitous arguments in the face of a plaintiff with a *prima facie* arguable case. (para 7) I

(2) The defendant, being a 100% shareholder of TNBT, would have benefitted from the activities of TNBT. From the plaintiffs' pleaded case it would appear that the defendant had made convenient use of TNBT to evade liability. (para 7)

(3) There was no merit in the defendant's contention that it had no opportunity to defend itself in the arbitral proceedings between the plaintiffs and TNBT. *Prima facie*, the plaintiffs had proceeded against the right party pursuant to the arbitration clause in the agreements. (para 7)

(4) An action will only be struck out if it is obviously unsustainable on the face of it. Here, there was sufficient evidence to require the defendant to answer the allegations of deception and/or fraud as raised by the plaintiffs. (para 7)

(5) It would be abhorrent to the notions of justice and fair play to allow the defendant to hide behind the doctrine of separate legal entity so as to evade its contractual obligations and duties. (para 7)

Case(s) referred to:

Adams And Others v. Cape Industries Plc And Another [1991] 1 All ER 929 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boo Are Ngor v. Chua Mee Liang [2009] 6 CLJ 617 FC ***(refd)***

Chatterton v. Secretary of State For India in Council [1895] 2 QB 189 ***(refd)***

Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534 HC ***(refd)***

Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor [1998] 3 CLJ 253 CA ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director-General of Trade Unions & Ors [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218 HC ***(refd)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Lee Eng Eow v. Mary Lee & Anor [1999] 3 CLJ 143 CA ***(refd)***

Lion Engineering Sdn Bhd v. Pauchuan Development Sdn Bhd [1998] 3 CLJ Supp 450 HC ***(refd)***

Malaysian Newsprint Industries Sdn Bhd v. Bechtel International, Inc & Anor [2008] 1 LNS 222 HC ***(refd)***

Meng Leong Development Pte Ltd v. J.I.P. Hong Trading Co Pte Ltd [1985] 1 CLJ 20; [1985] CLJ (Rep) 8 PC ***(refd)***

Nagubai Ammal and Others v. B Shama Rao [1956] AIR SC 593 ***(refd)***

Ng Wu Hong v. Abraham Verghese TV Abraham & Ors [2007] 1 LNS 138 HC ***(refd)***

Oh, Thevesa v. Sia Hok Chai [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148 HC ***(refd)***
Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor [1996] 4 CLJ 716 FC ***(refd)***
Pacific Internet Ltd v. Catcha.com Pte Ltd [2000] 3 SLR 26 ***(refd)***
Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd [2003] 1 CLJ 153 CA ***(refd)***
People's Insurance Co (M) Sdn Bhd v. People's Insurance Co Ltd & Ors [1985] 1 LNS 158 HC ***(refd)***
Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor [2005] 4 CLJ 750 CA ***(refd)***
Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Razshah Enterprise Sdn Bhd v. Arab Malaysian Finance Bhd [2010] 2 CLJ 457 CA ***(refd)***
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC ***(refd)***
Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC ***(refd)***
WY Chin v. Sarahon Construction Sdn Bhd & Anor [1994] 4 CLJ 233 HC ***(refd)***
Yap Sing Hock & Anor v. PP [1993] 1 BLJ 35 SC ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 27
Rules of the High Court 1980, O. 18 rr. 19(1)(b), (c), (d)

For the plaintiffs - Lim Koon Huan (Teoh Choon Hui with him); M/s Skrine
For the defendants - Rodney Colin Gomez (Alvin Julian & Anilraj with him); M/s Shearn Delamore & Co

Reported by Gan Peng Chiang

JUDGMENT

Hamid Sultan Abu Backer J:

[1] This is my judgment in respect of the defendant's application to strike out the plaintiffs' claim pursuant to O. 18 r. 19(1)(b)(c) and/or (d) of the RHC 1980, and/or inherent jurisdiction of the court.

Brief Facts

[2] The plaintiffs had entered into five different agreements with TNB Transmission Networks Sdn Bhd (TNBT). The defendant is a 100% shareholder of TNBT. The defendant had utilised TNBT to provide management and support services. The plaintiffs' claim against the defendant is for a debt accrued by TNBT, based on an

arbitration award relating to five agreements and the award was made by the learned arbitrator Dato KC Vohrah. The sum involved is as follows: (i) for the 1st plaintiff, the sum of RM106,888,499.34; (ii) for the 2nd plaintiff, the sum of RM6,102.922.50; with interests etc.

[3] The plaintiffs have successfully registered the award in the High Court. Thereafter the plaintiffs realised that the defendant had since decided to stop using TNBT to provide its management and support services, sometime in 2007 by making TNBT a dormant company. In consequence, the plaintiffs in this action have mounted an attack on the defendant who is the 100% shareholder of TNBT. And the plaintiffs say that (i) the plaintiffs clearly have a valid, reasonable and legitimate cause of action against the defendant (ii) the defendant is responsible for and is liable to pay the sums due and payable by its subsidiary TNBT under the final award as registered by the High Court on 22-7-2009 pursuant to s. 27 of the Arbitration Act 1952 (iii) the defendant was and is the alter ego, the directing mind and the party who has effective control of TNBT (iv) the veil of incorporation of TNBT must, in the interest of justice, be lifted to hold the defendant personally liable for the acts and liabilities of TNBT (v) the defendant had committed fraud against the plaintiffs by using TNBT as the contracting vehicle for the 1st to 5th agreements (vi) the plaintiffs' plea of fraud here relates to the actions of the defendant in using TNBT as its contracting vehicle, and causing and directing TNBT on the one hand, to act on its behalf to actively pursue and seek legal remedies against the plaintiffs, while on the other, denying any corresponding liabilities or obligations thereto (vii) the defendant is now stopped from denying or avoiding liability for the amounts due under the final award, as registered by the High Court on 22-7-2009 pursuant to s. 27 of the Act.

[4] The defendant says that the defendant and TNBT as plaintiffs in the Shah Alam suit No: MT3-22-323-2004 as early as 2004 had initiated an action against the plaintiffs in this action. In that suit the claim by the defendant and TNBT was for a refund of rentals etc, paid under the 1st to 5th of the agreement. The plaintiffs are the defendants in that suit and managed to obtain stay of the proceedings and referred the matter to arbitration and the defendant says (i) the award is not against defendant (ii) no privity of contract between the plaintiffs and the defendant (iii) the plaintiffs cannot be allowed to approbate or reprobate from its express election to refer the matter to arbitration solely against TNBT. And the learned counsel for the defendant submits as follows:

In this regard, the plaintiffs had 2 possible options in the Original Suit. The first option was to both defend the Original Suit and to file a counterclaim against TNBT and the defendant and the second option was to stay the Original Suit and refer the matter to arbitration. The plaintiffs elected to proceed with the second option in that they filed a stay of the proceedings *vis-à-vis* between them and the defendant and in regards to TNBT to refer the dispute (under the 5 Agreements) to arbitration.

In seeking the stay, the plaintiffs have elected to affirm the validity of the 5 Agreements. The effect of this election meant:

(a) The defendant was deprived from proceeding with its cause of action against the plaintiffs in the Original Suit as the matter was stayed; and

(b) The defendant was deprived of the opportunity to participate in the arbitration proceedings.

[5] The defendant and the plaintiffs had relied on the following cases namely: *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529; *Yap Sing Hock & Anor v. Public Prosecutor* [1993] 1 BLJ 35; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; *Honan Plantations Sdn Bhd v. Kerajaan Negeri Johor & Anor* [1998] 3 CLJ 253; *Tan Ah Tong v Perwira Affin Bank Bhd & Ors* [2001] 7 CLJ 500; *Oh, Thevesa v. Sia Hok Chai* [1992] 1 CLJ 170; [1992] 3 CLJ (Rep) 148; *Pacific Internet Ltd v. Catcha.com Pte Ltd* [2000] 3 SLR 26; *Meng Leong Development Pte Ltd v. J.I.P. Hong Trading Co Pte Ltd* [1985] 1 CLJ 20; [1985] CLJ (Rep) 8; *Pekeliling Triangle Sdn Bhd & Anor v. Chase Perdana Bhd* [2003] 1 CLJ 153; *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v. Director-General of Trade Unions & Ors* [1990] 2 CLJ 405; [1990] 2 CLJ (Rep) 218; *Chatterton v. Secretary of State For India in Council* [1895] 2 QB 189; *Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; *Boo Are Ngor v. Chua Mee Liang* [2009] 6 CLJ 617; *Lee Eng Eow v. Mary Lee & Anor* [1999] 3 CLJ 143; *People's Insurance Co (M) Sdn Bhd v. People's Insurance Co. Ltd & Ors* [1985] 1 LNS 158; *Adams and others v. Cape Industries plc and Another* [1991] 1 All ER 929; *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355; *Perman Sdn Bhd & Ors v. European Commodities Sdn Bhd & Anor* [2005] 4 CLJ 750; *WY Chin v. Sarahon Construction Sdn Bhd & Anor* [1994] 4 CLJ 233; *Nagubai Ammal and Others v. B Shama Rao* [1956] AIR SC 593; *Lion Engineering Sdn Bhd v. Pauchuan Development Sdn Bhd* [1998] 3 CLJ Supp 450; *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International, Inc &*

Anor [2008] 1 LNS 222; *Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 CLJ 346; [1988] 1 CLJ (Rep) 534; *Razshah Enterprise Sdn Bhd v. Arab Malaysian Finance Bhd* [2010] 2 MLJ 457; *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533.

Preliminaries

[6] In the instant case the allegation is that TNBT was used as a vehicle by the defendant to create liability for TNBT, for contracts, the benefit of which goes to the defendant. In essence the plaintiffs' case is that even though TNBT is a separate entity it was not doing business for its own benefit and the benefit was for the defendant which the defendant is liable to pay within the norms of corporate jurisprudence. If the allegations are true, then receiving the benefits and not paying tantamount to deception or fraud against the creditors of TNBT for which the court can provide relief. This distinction must be kept in mind to weigh the case of the plaintiffs.

[7] I have read the application, affidavits and submission of the parties in detail. I take the view that the defendant's application must be dismissed. My reasons *inter alia* are as follows:

(i) The defendant is not an ordinary corporation. It is recognised as an institution not only by the state but also by the public for whatever essential service it provides. It is pertinent for the defendant at all times to demonstrate good corporate governance, accountability and transparency. The courts will not ordinarily allow such institutions to avoid liability by circuitous arguments when the plaintiffs *prima facie* has an arguable case.

(ii) In the instant case the defendant is 100% shareholder of TNBT. They must have directly and/or indirectly benefitted from the activities of TNBT, as TNBT provided management and support services. From the plaintiffs pleaded case it will appear the defendant had made use of TNBT to conveniently evade liability.

(iii) I do not find any merit in the defendant's argument that they were given no opportunity to defend in the arbitration proceeding. *Prima facie* it is clear from the evidence that the plaintiffs had proceeded against the right party, pursuant to the arbitration clause in the respective agreement. The arbitrator, who was once a distinguished Court of Appeal judge, would not have made an award against TNBT if the case required the defendant to also be made a party.

(iv) It is trite that court will only entertain an application for striking out the action when it is clearly seen that a claim or answer is, on the face of it, obviously unsustainable. I have dealt with this area of jurisprudence in a number of cases. (see *Ng Wu Hong v. Abraham Verghese TV Abraham & 18 Ors* [2007] 1 LNS 138). I do not wish to repeat the same. In the instant case there is sufficient evidence at this stage to show that the defendant in law is required to answer the allegation of deception and/or fraud raised by the plaintiffs. Being a corporation of significant importance it is abhorrent to notion of justice and fair play to allow the defendant to hide behind the skirts of separate legal entity principle and evade liability. The law does not allow the defendant to do so. Support for the proposition is found in a number of cases. To name a few are as follows:

(i) In *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd*, *supra* Chong Siew Fai CJ (Sabah & Sarawak) had this to say:

> We are in complete agreement with the basic principle of the fundamental attribute of corporate personality, ie, that the corporation is a legal entity distinct from its members, be they individuals or corporate bodies - a principle firmly established since *Salomon v. Salomon & Co.* [1897] AC 22 HL. However, since then, the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the Courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus in cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the Court would disregard the notional separateness of the companies.

(ii) In *Yap Sing Hock & Anor v. Public Prosecutor*, *supra*, at p. 43, Peh Swee Chin SCJ stated:

> The category for such purposes for which the Court will lift the veil is never closed. A court has always the discretion to have a crack at it to do justice.
>
> All the cases for which the Courts have lifted the veil to do justice seem to be civil cases or due to illegal and improper purposes directed against the third parties or outsiders to the companies in question who have or would have suffered damage but for the lifting of such veil. In each of those cases, it would seem that the company in question has been used as an engine of fraud or wrongful deprivation, etc.

(v) It is in the interest of the public and to promote good governance, transparency and accountability, to have the plaintiffs' complaint that the defendant had committed fraud against the plaintiffs through the use of TNBT as the contracting vehicle, that this case is tried at the soonest. The court is ready to fix the matter for trial within 30 days from to date if the parties are ready to proceed.

[8] For reasons stated above I dismiss the defendant's application with costs. The defendant to pay the plaintiffs' fixed costs of RM10,000.

[9] I hereby order so.